Supreme Court, U. S.
FILED
NOV 29 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974.

No. 74-6691

KELLY DEAN SPARKS,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

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PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered August 30, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is not yet published. It

is set out in the Appendix hereto, pp. 33-56.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on August 30, 1974, and is set out in the Appendix hereto. Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment to the Constitution of the United States requires that a transcript be made of the voir dire examination of prospective trial jurors in a capital case, so as to assure a record of sufficient completeness to preserve the defendant's rights against unconstitutional methods of jury selection, as mandated by Witherspoon v. Illinoins, 391 U.S. 510 (1968).

2. Whether the rights of a criminal defendant to be presumed innocent until proven guilty and to have the burden upon the State to prove all elements of the case beyond a reasonable doubt are violated by instructions that (a) a killing is presumptively unlawful and done with malice when a deadly weapon is intentionally used, and (b) the burden of proof is on the defendant to satisfy the jury that there was no malice on his part, so as to reduce the crime to voluntary manslaughter.

3. Whether imposition and carrying out of a sentence of death for the crime of murder under the law of North Carolina violates the Eighth Amendment or Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA:

N.C.G.S. 14-17.

Murder in the first and second degree defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison. [As construed in State v. Waddell, 282 N.C. 431, 194 S.E. 2d. 19 (1973).]

N.C.G.S. 15-187.

Death by administration of lethal gas. - Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

N.C.G.S. 15-188.

Manner and place of execution. -The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary applicances for the infliction of the punishment of

death in accordance with the requirements of this article.

STATEMENT OF THE CASE

Defendant was tried on a bill of indictment charging him with the murder of George L. Lashley, the Chief of Police of Gibsonville, North Carolina. He was tried by judge and jury in the Superior Court of Guilford County, at Greensboro, North Carolina, during the October 29, 1973, session of court.

The killing took place on June 30, 1973. On the day prior to the killing defendant and his three companions, who later were the state's primary witnesses, ingested quantities of narcotics. Defendant took several shots of speed. Defendant and his campanions in an automobile stolen by defendant, drove for several hours on the evening preceding the killing and parked on an unimproved road near Gibsonville. All of the occupants of the automobile went to sleep.

At about 6:45 a.m. on June 30, defendant and his companions were awakened from their sleep by the victim George Lashley. Lashley searched defendant, handcuffed him, and placed him under arrest for possession of a sawed off shotgun that was visible in the vehicle. While Lashley was searching the automobile, a shot was heard and Lashley fell backwards. The wound, inflicted by .25 caliber pistol, was fatal.

A single one of defendant's companions identified defendant as the individual who had fired the shot, and also testified that she saw defendant drop the pistol in some grass near the scene of the shooting. Immediately after the discharge of the weapon, defendant, still handcuffed, fled into the woods.

No fingerprints were recovered from the .25 caliber pistol. Tests determined the primer residue (consistent with firing a weapon or handling a weapon that has been fired) was found present on the hands of defendant and each of his three companions.

The jury found defendant guilty of murder in the first degree. The Superior Court entered its judgment condemning defendant to death. The judgment was affirmed by the Supreme Court of North Carolina on appeal.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE VOIR DIRE EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD

OF SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTITUTIONAL METHODS OF JURY SELECTIONS, AS MANDATED BY WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

At petitioner's trial no transcript was made of the voir dire upon examination of prospective jurors, although the jurors were interrogated concerning their conscientious and religious scruples against capital punishment. The only reference in the record to these proceedings is the statement contained in the record and case on appeal filed in the Supreme Court of North Carolina:

> Seven jurors were challenged by the State and excused by the Court for cause upon the grounds that they possessed conscientious scruples against the imposition of capital punishment and because of these views would not under any circumstances return a verdict that would involve the death penalty regardless of what the facts of the case showed or what the evidence might reveal, and were irrevocably committed to vote against any verdict that would involve the death penalty regardless what the

> circumstances were or how aggravated the case was. [R.p.5]

In Witherspoon v. Illinois, 391 U.S. 510, 522 n.21, 515 n.9 (1968), this Court ruled that a death sentence cannot be carried out unless the record makes it "unmistakably clear" and "unambiguous" that the selection of the jury meets the minimum standards of Witherspoon. See also Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Mathis v. New Jersey, and companion cases, 403 U.S. 946-948 (1971). The Court held that:

> "If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than [that countenanced by Witherspoon] . . . the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion."

Witherspoon v. Illinois, supra, at 522, n.21. The Court has accordingly reversed death sentences, citing Witherspoon, where no record of voir dire was made, Mathis v. Alabama, 403 U.S. 946 (1971), rev'g 283 Ala. 308, 216 So. 2d 386 (1968), and where the court reporter's voir dire notes had not been transcribed and made part of the

appellate record. Funicello v. New Jersey, 403 U.S. 948 (171), rev'g State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968).

The question which this Court should now resolve is whether any alternative to an actual transcript of voir dire testimony can provide an adequate record for the resolution of a defendant's claim that veniremen were excluded on a broader basis than is countenanced by Witherspoon. The necessity of an actual voir dire transcript for resolving claims that capital trial jurors were improperly excluded because of their sentiments concerning the death penalty has been recognized by a number of courts. Garrison v. Patterson, 405 F.2d 696 (10th Cir. 1969); United States ex rel. Weston v. Sigler, 308 F. 2d 946 (5th Cir. 1962); State v Pinkney, Crim. No. 2490 (Cir. Ct. of Palm Beach, Fla., July 9, 1971); Edwards v. State, 287 Ala. 588, 253 So.2d 513 (1971).

The practice of stipulating the questions asked veniremen on voir dire, as a basis for justifying exclusions for cause on the ground of conscientious or religious scruples against the death penalty, will not pass muster under Witherspoon for several reasons.

First, a summary of the questions asked ignores crucial features of a Witherspoon claim:

> "[t]he critical question [. . .] is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood - or misunderstood - by prospective jurors. Any 'layman . . . (might) say he has scruples if he is somewhat unhappy about death sentences . . . . (Thus) a general question [. . .] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.'"-- Witherspoon v. Illinois, supra, at 515 n.9.

The practice followed here ignores the factual underpinnings of a Witherspoon claim. An abstract summary of questions asked does not reveal the views of an individual juror with the specificity necessary to make it "unmistakably clear." id. at 522 n. 21, that he was properly excluded for cause, because such a summary does not convey the nuances and uncertainties which well might qualify an affirmative answer.

Second, the stipulation of questions here does not clearly indicate whether veniremen who may have been excluded for cause from the panel were properly instructed as to their duty to

subordinate their personal views to the commands of the law as explained by the court. As the Court declared in Boulden v. Holman, 394 U.S. 478, 483-484 (1969): "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A venireman must be instructed that the law requires him to "subordinate his personal views to what he perceive[s] to be his duty to abide by this oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, at 514-515 n.7. The record as it now stands is utterly unilluminating as to any excluded venireman's conception of his proper duty as a juror.

Third, the opacity of this record effectively insulates from appellate review the trial court's determination that no Witherspoon error was committed. Where an appeal is provided, it cannot be unreasonably or arbitrarily limited. Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963). All too frequently a lower court's conclusory judgment that it has complied with Witherspoon has been reversed on appeal. See, e.g., Duplessis v. Louisiana, 403 U.S. 946 (1971), rev'g State v. Hudson, 253 La 992, 221 So. 2d 484 (1969).

Fourth, since by definition the Witherspoon issue involves a matter of life and death, any doubts as to the legitimacy and sufficiency of a practice that affects the ability of a condemned defendant to adequately raise issues which might save his life must be resolved in favor of the condemned defendant. "What is at stake for an accused facing death . . . demands the utmost solicitude of which courts are capable. . . ." Boykin v. Alabama, 395 U.S. 238, 243-244 (1969); Cf., Williams v. Georgia, 349 U.S. 375, 391 (1955); Stein v. New York, 346 U.S. 156, 196 (1953); Andres v. United States, 333 U.S. 740, 752 (1948).

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

The trial court instructed the jury:

> Now, if the State proves beyond a reasonable doubt that the defendant intentionally killed George L. Lashley with a deadly weapon or intentionally inflicted a wound upon him with a deadly weapon that proximately caused his death, the law raises two presumptions, first, that the killing was unlawful and, second, that it was done with malice.
>
> In order for you to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant intentionally shot and killed Lashley with a deadly weapon thereby proximately causing his death. Then nothing else appearing, the defendant would be guilty of second degree murder. That is because if a person is killed with a deadly weapon, the law presumes malice which, of course, may be rebutted, but the law presumes malice when a person is killed with a deadly weapon. [R. pp. 161, 163].

Under North Carolina law, malice is an essential ingredient of both first degree murder and second degree murder. Second degree murder was a lesser included offense submitted to the jury in this case.

With regard to the other lesser included offense of voluntary manslaughter, the trial court instructed the jury:

> In order to reduce the crime to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. In that connection, I further instruct you as to the law arising from the alleged drugged condition, as follows:
>
> A killing committed by a person who is voluntarily under the influence of some drug is manslaughter, if the same act committed by a person not under the drugged condition would constitute manslaughter. In other words, a drugged condition cannot excuse or mitigate the crime of manslaughter. It has no application whatever to it.

To negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:

First, that he shot and killed George L. Lashley in the heat of passion. That does not mean mere anger. It means that the defendant's state of mind was at the time so violent as to overcome his reason, so much that he could not think to the extent necessary to form a deliberate purpose and control his acts.

Two, that his passion was produced by acts of George L. Lashley which the law regards as adequate provocation. This may consist of anything which has the natural tendency to produce such passion in a person of average mind and disposition, but words and gestures alone, however insulting, do not constitute adequate provocation when no assault is made or threatened against the defendant.

Three, that the shooting took place so soon after provocation that the passion of a person of average mind and disposition would not have cooled. [R. pp. 166, 167].

These instructions were upheld by the Supreme Court of North Carolina. They are

consistent with the well-settled case law of North Carolina. Malice and unlawfulness of the killing are presumed, when a deadly weapon is intentionally used. 4 Strong's North Carolina Index 2d, Homicide, Section 14, pp. 207-209. The burden is upon the defendant to disprove malice and reduce a killing to voluntary manslaughter. State v. Absher, 226 N.C. 656, 40 S.E. 2d 26 (1946); State v. Alston, 214 N.C. 93, 197 S.E. 719 (1938).

These long-standing rules are no longer valid in light of decisions by this Court. It is now mandated by the Fourteenth Amendment that in a criminal action the burden of proof always be placed upon the state, guilt must be proved beyond a reasonable doubt, and the defendant is presumed innocent until proved guilty. Re Winship, 397 U.S. 358, (1970); Speiser v. Randall, 357 U.S. 513 (1958).

The North Carolina rule of presumed malice and unlawfulness, and placement of the burden on the defendant to disprove malice, are contrary to these constitutional presumptions.

Recently the Supreme Court of Hawaii correctly held invalid the Hawaii statute that placed the burden on defendant to show malice was not present or that there was legal justification or extenuation in a killing. State v. Cueva, 488 p. 2d 322 (Haw. 1971). Holding this statute unconstitutional, the court declared, "Under our legal

system, the burden is always on the prosecution to establish every element of crime beyond a reasonable doubt, never upon the accused to disprove the existence of any necessary element."

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Following Furman v. Georgia, 408 U.S. 238 (1972), the nearly universal response of state courts was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision of that date declared unconstitutional. These citations are set out in the Appendix to this petition, pp. 57-61.

Approximately 50 persons are now under sentence of death in North Carolina. See Petitions for Certiorari in Dillard v. North Carolina, No. 73- pp. 29-31, n.28; and Honeycutt v. North Carolina, No. 73- , p.13 n.11. These North Carolinians make up about one third of all persons presently on death row throughout the United States. All of the North Carolina prisoners

under death sentences were convicted under the pre-Furman North Carolina statutes, resurrected by the case of State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973). Except in North Carolina, almost all persons presently under death sentence were convicted under post-Furman statutes. Petition for Certiorari in Dillard v. North Carolina, No. 73- , p.15, n.11.

Prior to 1947, North Carolina law had required the imposition of death penalty upon all convictions for the crimes of first degree murder, rape, first degree burlary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. The Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973), unanimously held that these statutes in effect from 1947 to 1972, were unconstitutional under Furman. By a four to three margin, the court held that the only portion of the North Carolina statutes invalidated by Furman was the 1947-1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1947 state. Upon the return of a verdict of guilty of any of the four capital offenses, the court must pronouce a sentence of death. Neither the jury nor the court has the discretion to sentence the defendant to

life imprisonment. It was under this construction of North Carolina law that petitioner was sentenced.

A. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

Although the prevailing opinions in Furman v. Georgia differ somewhat regarding the questions left unanswered, by that holding they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes. 408 U.S. at 257-306 (Mr. Justice Brennan); 408 U.S. at 314-374 (Mr. Justice Marshall); 408 U.S. at 242 (Mr. Justice Douglas); 408 U.S. at 309-310 (Mr. Justice Stewart); 408 U.S. at 313 (Mr. Justice White).

An examination of certain characteristics of North Carolina law and practice indicates that the Waddell decision simply had the effect of displacing the focus, lowering their visibility, diffusing the responsibility, and thereby increasing the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty:

1. Prosecutorial Discretion.

The District Attorney (formerly the solicitor) is given broad and essentially unreviewable authority to initiate and terminate prosectuion.

State v. Loesh, 237 N.C. 611, 75 S.E. 2d 654 (1953). He is empowered not only with the absolute discretion of whether and what to charge, but also the firm control of the discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E. 2d 453 (1971). The Supreme Court of North Carolina will not review prosecutorial decisions. See State v. Casey, 159 N.C. 472, 74 S.E. 625 (1912); State v. Jarrette, 284, N.C. 625, 202 S.E. 2d 721 (1974).

This prosecutorial discretion is borne out by current statistics in that there have been only two convictions for first degree burglary during the first year of Waddell's implementation. State v. Poole, N.C. 203 S.E. 2d 786 (1974); State v. Henderson, 285 N.C. 1, 203 S.E. 2d (1974). In previous recent years there were about forty convictions annually. Biennial Report of the Attorney General, Vol. 32 at 515, and Vol. 33 at 377. But there were 39,210 burglaries and housebreakings reported to the police in 1972. Federal Bureau of Investigation, United States Department of Justice, Crime in the United States 1972, p. 74 (1973). The conclusion is inescapable that prosecutors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a District Attorney to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely.

3. Jury Discretion.

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right. The omission of this instruction is reversible error even when the defendant fails to request it. This principle has been previously invoked to reverse capital convictions. N.C.G.S. sec. 15-170 and sec. 15-169; State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Jones 249 N.C. 134, 105 S.E. 2d 513 (1958).

It is important to note that a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal. State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276, N.C. 641, 174 S.E. 2d 793 (1970).

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that it is proper for the trial judge to inform the jury of the consequences of their possible verdicts if they are confused or uncertain as to whether one of the permissible verdicts would result in a mandatory death sentence, and that counsel is permitted to argue to the jury that the death penalty must be imposed in the event a verdict of guilty is returned on a capital charge. State v. Britt, 285 N.C. 256, 204 S.E.3d 817 (1974). This holding implements the power of the jury to avoid the imposing of the death penalty in a sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty. Under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit the lesser offenses, and the jury has discretion to convict for lesser offenses.

4. Executive Clemency.

The governor's discretion to spare the lives of condemned felons is absolute. North Carolina Constitution, Article III, §5(6). Between 1903 and 1963, there were 235 out of 358 condemned prisoners whose death sentence were commuted to life imprisonment - 65.6 percent of the death sentences

imposed in the State over 60 year period.

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal justice system that responds to "mitigating factors" which, while insufficient to justify a verdict of not quilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment. Note, Executive Clemency in Capital Cases, 39 N.Y.U.L. Rev. 136, 165-166 (1964).

B. The Arbitrariness of a Mandatory Death Penalty.

Should the argument fail, made in part A above that unconstitutional discretion persists in the post-Waddell determination of which defendants shall be capitally punished, another form of unconstitutional arbitrariness in imposing death sentences is readily percepitible. The clear intent of the North Caroliha court in Waddell is to require that all persons successfully prosecuted for murder, rape, arson and burglary, suffer the death penalty.

The Waddell decision leaves no room for factors of mitigation and extenuation or matters of aggravation. The thief who steals a loaf of bread from an occupied house at night goes to the gas chamber along with the murderer who tosses a bomb into a Sunday School class.

The five judges who made up the majority in Furman v. Georgia agreed that arbitrary and irrational impositions of the death penalty are unconstitutional. While rigid and precise standards to control the judge or jury imposing the death sentence are neither constitutionally required nor practically attainable, McGautha v. California, 402 U.S. 183 (1970), the utter absence of standards for determining which courses of criminal conduct are serious enough to warrant the death penalty, is unconstitutionally arbitary.

C. The Inconsistency of the Death Penalty With Contemporary Standards of Decency.

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not"confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U.S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U.S. 660,666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal

punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime. While we have abandoned the essential moral and social proposition that a citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments, a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. H.L.A. Hart, Punishment and Responsibility, p. 1 (1968). At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life." Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense becuase it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." --408 U.S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons--who were, for the most part, members of powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is

what society does with it." 408 U.S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishement legislation since Furman, the imposition of the death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being given in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a

concomitant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution. Increased respect for life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death.

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United State is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 894 (1972).

The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U.S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: There is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has

accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

CONCLUSION

For the reasons set forth above, petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

No. 26 SPRING TERM 1974

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v. From Guilford

KELLY DEAN SPARKS

Appeal by defendant from Copeland, S.J., at 29 October 1973 Criminal Session of Guilford Superior Court.

On an indictment proper in form, defendant was tried and convicted of murder in the first degree of George L. Lashley. Defendant appeals from a judgment imposing sentence of death.

The State's evidence tends to show that on 29 June 1973 defendant was driving his mother's car around Greensboro, North Carolina. The State's three principal witnesses, Paul Darrell Stone, Paula Rogers, and Robin Diana Phillips [hereinafter referred to as Stone, Paula, and Robin] were with defendant, and the four of them took differing amounts of "speed" at various times during the day. During the afternoon defendant drove his mother's car to a lake near Greensboro, and there defendant and Stone discharged a .25-caliber pistol belonging to defendant several times. Later that day defendant took the two girls, Paula and Robin, to an establishment known as the Jokers 3 in Greensboro.

Defendant and Stone then went "riding around." While riding around, defendant spotted a white Mustang automobile and stopped near it. He proceeded to "straight wire" that car and drive off in it, having Stone follow him in the car belonging to defendant's mother. Later they parked defendant's mother's car, and defendant and Stone went back to the Jokers 3 in the Mustang and picked up Paula and Robin. This was sometime between 7:00 and 8:30 p.m.

After driving around Greensboro for awhile in the stolen Mustang, the four started discussing the possibility of going on a trip. They were out of drugs, and defendant suggested they go to Gibsonville and "rob" a particular doctor's office since, according to defendant, this doctor kept a lot of drugs there. The group agreed to this plan. When they arrived in Gibsonville, they drove by the doctor's office several times. Some people were still on the street nearby, so they decided they would wait until early the next morning before "robbing" the office.

They then went to a restaurant to eat. Afterwards defendant drove the car to a wooded area near the edge of Gibsonville where one of the city's sewer system pump stations was located. There defendant parked and all four fell asleep in the car.

Stone, Paula, and Robin all testified that the four of them had

been taking "speed" during the day, but they were out and had gone to Gibsonville to try to get some type of drugs on which to get "high"; and that none of them were "up" on drugs when they went to sleep in the car.

On the front seat of the car next to defendant was a sawed-off shotgun that defendant and Stone had stolen earlier in the day. Defendant also had his .25-caliber pistol under the driver's seat.

Around 6:30 a.m. on the next day Vance Evans, the assistant superintendent of Gibsonville, was checking the various pump stations around the city. He observed the white Mustang near the pump station on city property where no one was authorized to park. He immediately drove to the city hall and reported this to the town's chief of police, George L. Lashley. Evans and Chief Lashley drove to the pump station and parked the police car behind the Mustang. Chief Lashley walked up to the driver's side of the car and observed the sawed-off shotgun in the front seat. He woke defendant, asked him if he did not know that it was illegal to have a sawed-off shotgun, and told him to get out of the car. Chief Lashley then searched and handcuffed defendant, and told him he was under arrest for possessing a sawed-off shotgun.

Stone, Paula, and Robin were awakened by this activity. Stone was ordered out of the car and was searched but not handcuffed--apparently because Lashley had only one pair of handcuffs. Next, at the direction of Lashley, Paula and Robin got out of the car. Chief Lashley then searched the car, beginning with the driver's side. He removed several items from the driver's side of the car, placed them on top of the car, and then walked in front of the car to the passenger's side. Lashley left the door on the driver's side open, and as he walked toward the other side of the car, defendant moved from a position at the rear of the car up to the driver's side by the open door where Lashley had just been. Meanwhile Chief Lashley was searching the passenger's side and was leaning forward with his shoulder inside the car. As Lashley was going through a paper bag on the front floorboard, defendant was seen to suddenly "move up in the doorway and turn around and look over his shoulder, and then kind of squat." Then a shot was fired, followed by two clicking sounds. Lashley screamed, grabbed his shoulder, and fell backwards.

Immediately after the shot and the clicks, defendant ran from the scene of the shooting into some nearby woods, dropping a pistol from his handcuffed hands as he ran. Stone and Evans quickly tried to assist Chief Lashley who was bleeding badly. When an ambulance

arrived a few minutes later, Lashley was dead. According to medical testimony, the bullet went through the second rib on the right side, the upper and lower parts of the right lung, the aorta, and then lodged in the abdominal cavity near the pancreas.

A .25-caliber pistol identified as belonging to defendant was found by investigating officers in some grass where one of the State's witnesses had seen defendant drop a pistol as he fled the scene.

Other facts pertinent to decision are set out in the opinion.

Defendant did not testify or offer any evidence.

Attorney General ROBERT MORGAN and Assistant Attorney General THOMAS B. WOOD for the State.

SMITH, CARRINGTON, PATTERSON, FOLLIN & CURTIS by NORMAN B. SMITH for defendant appellant.

MOORE, Justice.

Defendant first contends that the court erred in excusing prospective jurors for cause due to their scruples against capital punishment.

The parties stipulated:

"Seven jurors were challenged by the State and excused by the Court for cause upon the grounds that they possessed conscientious scruples against the imposition of capital punishment and because of these views would not consider any verdict that would involve the death penalty, would not under any circumstances return a verdict that would involve the death penalty regardless of what the facts of the case showed or what the evidence might reveal, and were irrevocably committed to vote against any verdict that would involve the death penalty regardless of what the circumstances were or how aggravated the case was."

Since Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968), this Court has consistently held that if a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. State v. Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974); State v. Noell,

284 N.C. 670, 202 S.E. 2d 750 (1974); State v. Anderson, 281 N.C. 261, 188 S.E. 2d 336 (1972); State v. Watson, 281 N.C. 221, 188 S.E. 2d 289 (1972); State v. Cook, 280 N.C. 642, 187 S.E. 2d 104 (1972); State v. Westbrook, 279 N.C. 18, 181 S.E. 2d 572 (1971); State v. Dickens, 278 N.C. 537, 180 S.E. 2d 844 (1971); State v. Atkinson, 275 N.C. 288, 167 S.E. 2d 241 (1969).

In view of the stipulation entered into by the parties, the seven jurors were properly excused for cause. This assignment of error is overruled.

Defendant next contends that the court erred in permitting the State to introduce in evidence the bloody shirt which Chief Lashley was wearing when shot, and State's Exhibit No. 18, a photograph of the deceased made on an ambulance stretcher.

Defendant by his plea of not guilty denied that he fired the lethal weapon or directed its aim. The evidence of the blood-stained shirt and the photograph of the body of the deceased corroborated the testimony of the State's witnesses already in the record. The location of the blood upon the victim's shirt and the photograph of the body and the wound would indicate the angle of the bullet which struck the victim and the direction from which it was fired. These also indicated an overhead shot from the opposite side of the car from where the victim was standing,

and corroborated the witnesses' testimony that such was the location of defendant at the time the pistol was fired.

> "'* * *In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the circumstances of the crime* * *.' Stansbury, North Carolina Evidence, 2d Ed., §118; State v. Rogers, 275 N.C. 411, 430, 168 S.E. 2d 345; State v. Atkinson, 275 N.C. 288, 310, 167 S.E. 2d 241; State v. Speller, 230 N.C. 345, 53 S.E. 294; State v. Petry, 226 N.C. 78, 36 S.E. 2d 653." State v. Felton, 283 N.C. 368, 196 S.E. 2d 239 (1973).

The court properly instructed the jury that the photograph was admitted solely for the purpose of illustrating and explaining the testimony of the witnesses and not as substantive evidence. Under such circumstances, the fact that the photograph depicts a gruesome or gory spectacle does not render it inadmissible. State v. Robinson, 283 N.C. 71, 194 S.E. 2d 811 (1973); State v. Frazier, 280 N.C. 181, 185 S.E. 2d 652 (1972); State v. Chance, 279 N.C. 643, 185 S.E. 2d 227 (1971); State v. Atkinson, supra. See 2 Strong, N.C. Index 2d, Criminal Law §§ 42, 43 (1967).

Defendant next contends that it was error to permit an expert chemist to testify for the State that defendant "could have" fired the pistol instead of limiting the witness's testimony to whether defendant probably discharged the weapon.

Mr. R. D. Cone, who was qualified as an expert forensic chemist specialized in the field of physical evidence, testified that from the tests he had conducted on defendant's left hand there were indications that defendant "could have" fired a gun. Defendant contends that this statement does not meet the tests as set out in Lockwood v. McCaskill, 262 N.C. 663, 138 S.E. 2d 541 (1964), and that the opinion of the expert witness should have been to the effect that it was "reasonably probable" that the defendant fired the gun.

In Apel v. Coach Co., 267 N.C. 25, 147 S.E. 2d 566 (1966), this Court approved questions where expert witnesses were asked their opinion as to whether the accident which was the subject of the suit "could or might have" resulted in the type of disability alleged by the plaintiff.

In Mann v. Transportation Co. and Tillett v. Transportation Co., 283 N.C. 734, 747, 198 S.E. 2d 558, 567 (1973), a mechanic, testifying as to a defect in a bus, stated that this defect "could or might have caused the steering system to fail when Gibbs attempted to steer

the bus around the left curve." Justice Sharp in commenting on this testimony stated:

> "It is apparent that, in phrasing the hypothetical question which elicited the foregoing opinion from Jeffries, counsel was observing the rule stated in 1 Stansbury, North Carolina Evidence §137, at 453 (Brandis Rev. 1973), that if the question relates to cause and effect an expert witness 'should be asked whether in his opinion a particular event or condition, could or might have produced the result in question, not whether it did produce such result.' This form of question clearly invited the argument, which Coach Company makes, that could or might have in Jeffries' answers amounts to nothing more than his speculation as to possibilities. The situation here produced demonstrates the validity of Professor Henry Brandis' comment that an expert witness should be allowed 'to make a positive assertion of causation when that conforms to his true opinion, reserving "could" and "might" for occasions

> when he feels less certainty'; that if the expert witness, 'though holding a more positive opinion, is forced to adopt the "could" or "might" formula, then the result is patently unjust, unless the more positive opinion may be said to be inherently incredible.' 1 Stansbury, North Carolina Evidence § 137, at 455 & n. 97 (Brandis Rev. 1973). See also the comment of Justice Higgins in Apel v. Coach Co., 267 N.C. 25, 30, 147 S.E. 2d 566, 569-70 (1966). Cf. Service Co. v. Sales Co., 259 N.C. 400, 414, 131 S.E. 2d 9, 20 (1963)."

Although in this case the witness Cone should have been allowed to give a more positive opinion, if he had one, it was not error to allow this expert witness to testify that the defendant "could have fired a gun with his left hand."

During the course of the argument by the district attorney, the following proceedings were had:

> "THE COURT: The Court Reporter is present, and at this time let the record show that the District

Attorney proposes to argue the case to the jury about his contention about the evidence in the case by way of having the handcuffs which are in evidence and identified as State's Exhibit 9 placed on his hands and that he proposes to demonstrate to the jury the manner in which the state of North Carolina contends the alleged murder took place. To this demonstration, counsel for the defendant objects and excepts to the demonstration. The objection is overruled, with this admonition to the jury:

"This you will take the evidence from the witnesses on the stand and the evidence that was offered here in this courtroom, as you recall it, as it came from the witnesses on the stand and the evidence that was offered and shown to you. Both the District Attorney and counsel for the defendant have a right under the law to argue their contentions about what evidence tends to show. You will bear that in mind at all times as to this demonstration

about to be given, and all other arguments that the District Attorney makes and all arguments that counsel for the defendant makes.

"Proceed."

Defendant contends that the court committed reversible error by allowing the district attorney to demonstrate the firing of the weapon with his hands handcuffed behind him to illustrate how the defendant allegedly killed the deceased, for the reason that this demonstration amounted to experimental evidence which was given by argument of counsel and not through a witness under oath.

Defendant cites State v. Williams, 168 N.C. 191, 83 S.E. 714 (1914), and State v. Eagle, 233 N.C. 218, 63 S.E. 2d 170 (1951), in support of his contention that the solicitor's argument was improper. In Williams counsel for defendant "proposed to take some disinterested person in the courtroom and demonstrate before the jury on that person the positions that defendant and the deceased were in at the time of the shooting, as testified to by defendant, in order to show that the wounds would have been inflicted in the body of the deceased at the place and would have had the range or direction which they had, as testified to by the doctors." The defendant, while on the stand as a witness in his own behalf, demonstrated before the jury the

position he, the defendant, was in and the position the deceased was in and the way the deceased had hold of him when he fired the shots. This Court stated that it could not see how defendant had been deprived of any of his substantial rights by the trial court's refusal to allow defendant's counsel to make the suggested demonstration. The Court then stated:

> "The defendant was permitted to make his demonstration before the jury as a part of his evidence, and it then became the duty and right of counsel to comment on the evidence, but not to introduce new elements. Matters of this kind are left to the sound discretion of the presiding judge." (Emphasis added.)

In Eagle the solicitor in his argument to the jury exhibited an unidentified bottle of whiskey which had not been introduced in evidence. This Court in holding this action erroneous stated:

> "If in the opinion of the Solicitor the ends of justice required the exhibition to the jury of the bottle of whiskey taken from the defendant's car at the time of his arrest, the bottle should have been identified and introduced

> in evidence at the proper time during the course of the trial, or a motion made to reopen the case and permit its identification and introduction in evidence. [Citations omitted.]"

In both Williams and Eagle the demonstrations before the jury involved matters not in evidence. In the present case the State offered evidence that (1) defendant and the deceased were at opposite sides of the car, the defendant standing near the front door on the driver's side with his hands handcuffed behind him, while the victim was bending down on the passenger's side searching the front seat of the car; (2) defendant was looking over his shoulder at a time immediately preceding the shooting with his manacled hands pointing toward the victim; (3) defendant had a pistol in his hands immediately before and after the shooting, and burned gunpowder concentrations were found near the belt loops on the back of defendant's trousers; and (4) the position of the wound upon the victim's body indicated that he was shot by someone standing above, shooting in a direction toward his head--the position in which defendant was last seen immediately before the fatal shot was fired.

From this evidence it was proper to infer that the defendant inflicted the fatal injury in the way demonstrated by the solicitor. His actions were

supported by the evidence.

As stated in State v. Rose, 270 N.C. 406, 411, 154 S.E. 2d 492, 496 (1967):

> "'The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge.' S. v. Bryan, 89 N.C. 531. Ordinarily, this Court will not review his discretion unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury.' S. v. Baker, 69 N.C. 147; S. v. Bowen, 230 N.C. 710, 55 S.E. 2d 466, and cases cited; S. v. Smith, supra [240 N.C. 631, 83 S.E. 2d 656]; S. v. Barefoot, 241 N.C. 650, 86 S.E. 2d 424."

See also State v. Westbrook, supra.

No abuse of discretion is shown. This assignment of error is without merit.

Defendant alleges that reversible error was committed by the court in failing to charge that it was necessary for defendant to have held a "fixed design" to take the life of the deceased

in order to be found guilty of first degree murder. He cited State v. Brown, 218 N.C. 415, 11 S.E. 2d 321 (1940); State v. Burney, 215 N.C. 598, 3 S.E. 2d 24 (1939); and State v. Spivey, 132 N.C. 989, 43 S.E. 475 (1903), for the proposition that the "fixed design" definition of intention to kill was a proper part of the standard definition of this element of first degree murder. The definition of first degree murder as contained in those cases was held to be correct, but it is not necessary that the words "fixed design" always be included in defnining murder in the fist degree. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder. State v. Duncan, 282 N.C. 412, 193 S.E. 2d 65 (1972); State v. Robbins, 275 N.C. 537, 169 S.E. 2d 858 (1969); State v. Propst, 274 N.C. 62, 161 S.E. 2d 560 (1968); State v. Downey, 253 N.C. 348, 117 S.E. 2d 39 (1960).

In the present case the trial court in its final mandate to the jury stated:

> "So I charge you that if you find from the evidence and beyond a reasonable doubt that on or about June 30, 1973, Kelly Dean Sparks intentionally shot and killed George

L. Lashley with a .25 caliber pistol, it being a deadly weapon, thereby proximately causing George L. Lashley's death, and that Kelly Dean Sparks intended to kill George L. Lashley and that he acted with malice and with premeditation and deliberation, it would be your duty to return a verdict of guilty of first degree murder."

The phrase "that he intended to kill" is self-explanatory, and, absent a special request for instructions from the defendant, the presiding judge was not required to supply its definition. As stated by Chief Justice Stacy in State v. Plemmons, 230 N.C. 56, 52 S.E. 2d 10 (1949): "The jury could hardly have failed to understand what was meant by the expression 'with intent to kill.' It is self-explanatory. There is no point in elaborating the obvious." See State v. Jennings, 276 N.C. 157, 171 S.E. 2d 447 (1970); 3 Strong, N.C. Index 2d, Criminal Law § 113, p. 14 (1967). This assignment of error is overruled.

Defendant next contends that there was not sufficient evidence to submit the charge of murder in the first degree to the jury because of lack of evidence of premeditation and deliberation.

This assignment raises the question whether the evidence for the State,

taken as true and considered in the light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that defendant, after premediation and deliberation, formed the fixed purpose to kill Chief Lashley and thereafter carried out that purpose. State v. Van Landingham, 283 N.C. 589, 197 S.E. 2d 539 (1973); State v. Perry, 276 N.C. 339, 172 S.E. 2d 541 (1970). Premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide. State v. Walters, 275 N.C. 615, 170 S.E. 2d 484 (1969); State v. Faust, 254 N.C. 101, 118 S.E. 2d 769, 96 A.L.R. 2d 1422, cert. den. 368 U.S. 851, 7 L. Ed. 2d 49, 82 S. Ct. 85 (1961).

The evidence in this case tends to show that defendant had had a full night's sleep before being awakened and handcuffed by Chief Lashley; that he and his companions were in full control of their faculties despite their use of drugs on the preceding day; that some 10 to 15 minutes elapsed from the time defendant was awakened and ordered from the car until the actual firing of the shot; that Chief Lashley was in uniform and was wearing his badge on this occasion; that defendant with a gun in his hands was observing Chief Lashley over his shoulder immediately before the fatal shot was fired; and that after the shot was fired a clicking sound was heard at least twice--the same sound

that had been heard the day before when the pistol "jammed" and failed to fire. Immediately after the shot was fired, defendant ran dropping the pistol near the scene of the shooting. When the pistol was found, it was "jammed" with a shell partially in the barrel.

The want of provocation, the absence of any excuse or justification for the shooting, the number of shots fired or attempted to be fired, the fact that defendant ran immediately after the shooting, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation, and was sufficient to be submitted to the jury on the issue of murder in the first degree. State v. Van Landingham, supra; State v. Duncan, supra; State v. Perry, supra; State v. Faust, supra; State v. Lamm, 232 N.C. 402, 61 S.E. 2d 188 (1950).

Defendant next avers that the court committed reversible error by instructing the jury that if the State proves beyond a reasonable doubt that defendant intentionally killed Lashley with a deadly weapon or intentionally inflicted a wound upon Lashley with a deadly weapon that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. In suport of this contention, defendant cites Re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Speiser v. Randall, 357 U.S. 513, 2 L Ed. 2d 1480, 78 S. Ct. 1332 (1958). Neither

of these cases is pertinent to the facts in this case.

Defendant in his brief states:

> "The instructions complained of here are consistent with the well-settled case law of this state. Malice and unlawfulness of the killing are presumed, when a deadly weapon is intentionally used. 4 Strong Index 2d, Homicide, Sec. 14, pp. 207-209. The burden is upon the defendant to disprove malice and reduce a killing to voluntary manslaughter. State v. Absher, 226 N.C. 656, 40 S.E. 2d 26 (1946); State v. Alston, 214 N.C. 93, 197 S.E. 719 (1938)."

Defendant contends, however, that these long-standing rules are no longer valid and are contrary to the constitutional provision that the State has the burden of providing all the elements of the case beyond a reasonable doubt. He cites State v. Cuevas, 488 P. 2d 322 (Haw. 1971), in which the Supreme Court of Hawaii invalidated a statute that placed the burden on defendant to show malice was not present or that there was legal justification or extenuation in a killing, stating: "Under our legal system, the burden is always on the prosecution to establish every element of crime by proof beyond a reasonable doubt, never upon the accused to dis-

prove the existence of any necessary element." Defendant contends that that decision ought to be followed by this Court. We have carefully considered defendant's argument that we should change our well-established rule. However, we are not persuaded to do so. See State v. Jennings, supra; State v. Propst, supra. There is evidence tending to show that on 29 June 1973 defendant and his companions took differing amounts of "speed" at various times during the day. That night they ran out of drugs and planned to rob a doctor's office in Gibsonville. However, they did not do so, and, according to the three persons who were with defendant, none of them were "up" on drugs when they went to sleep in the car that night nor when they awakened the next morning. The defendant did not testify or offer any evidence.

Although there was no evidence that defendant was under the influence of drugs or intoxicants at the time of the fatal shooting, the trial judge, out of an abundance of caution and at the request of defendant, instructed the jury on defendant's contention with reference to mental deficiency brought about by the use of drugs as a defense to first degree murder. These instructions were all more favorable to defendant that he was entitled to receive, and if there was error or inconsistency in them, it was harmless to defendant.

Defendant next avers that the court committed reversible error by failing to submit the crime of involuntary manslaughter, contending that it is reasonable to suppose that defendant fired a single shot at the police officer only for the purpose of temporarily disabling, stunning, or injuring slightly, in order to effect his escape from custody.

There is no evidence to support this contention. All the evidence tends to show that defendant intentionally shot and killed Chief Lashley. "The necessity for instructing a jury as to an included crime of lesser degree than the one charged arises only when there is evidence to support the included crime of lesser degree. State v. Watson, 283 N.C. 383, 196 S.E. 2d 212; State v. Bryant, 280 N.C. 551, 187 S.E. 2d 111; State v. Carnes, 279 N.C. 549, 184 S.E. 2d 235." State v. Henderson, 285 N.C. 1, 22, 203 S.E. 2d 10, 24 (1974). See also State v. Bunn, 283 N.C. 444, 196 S.E. 2d 777 (1973); State v. Freeman, 275 N.C. 662, 170 S.E. 2d 461 (1969). This assignment of error is overruled.

Finally, defendant contends that the imposition of the death penalty in this State is cruel and unusual punishment in violation of the Eighth Amendment and arbitrary punishment in violation of the Fourteenth Amendment to the United States Constitution.

Defendant admits that this Court has rejected this argument in State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to our decision in that case. See State v. Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974); State v. Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974); State v. Crowder, 285 N.C. 42, 203 S.E. 2d 38 (1974); State v. Henderson, supra; State v. Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974); State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973).

Because of the imposition of the death sentence, we have carefully examined the entire record in this case, including the charge of the court, and have considered every contention and argument advanced by defendant. Our examination discloses that defendant received a fair trial, free from prejudicial error.

No error.

CHIEF JUSTICE BOBBITT, JUSTICE HIGGINS and JUSTICE SHARP dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, 234 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974).

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd __ N.C. __, 203 S.E. 2d 786 (April 10, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd __ N.C. ___, __S.E.2d ___, N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8034 (September 12, 1973), rev'd __ N.C.___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6706 (September 19, 1973); State v. Fowler, __ N.C. __, 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12351 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12672 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v.

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Supreme Court, U. S.
FILED
FEB 12 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-669

KELLY DEAN SPARKS,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
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No. 74-669

KELLY DEAN SPARKS,
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STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

From a verdict of guilty of first degree murder and the imposition of a sentence of death entered by the Guilford County Superior Court in October of 1973, the defendant perfected a direct appeal to the North Carolina Supreme Court. That Court found no error, and upheld the sentence of the Superior Court. The opinion of the Supreme Court of North Carolina is found in its reports at 285 N.C. 631.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE *VOIR DIRE* EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTUTUTIONAL METHODS OF JURY SELECTION, AS MANDATED BY *WITHERSPOON v. ILLINOIS*, 391 U.S. 510 (1968).

II.

WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

III.

WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA , VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION

ARTICLE 4, SECTION 4.

"The United States shall guarantee to every state in this union a republican form of government . . . ."

("Republic, commonwealth, a popular state or government; or a nation where the people have the government in their own hands." Vol. III ENCYCLOPEDIA BRITANNICA A DICTIONARY OF ARTS AND SCIENCES, 548, 1st Ed. (1771))

("republic, n. number 1. A state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen . . . by them." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, 1218 (1966))

AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VIII.

"Excessive bail shall not be required, nor excessive

fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT X.

"The powers not delegated to the U.S. by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA

N.C.G.S. 14-17

Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.** All other kinds of murder shall be deemed

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* Subsequent to this Court's decision in *Furman*, the North Carolina Supreme Court in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above unconstitutional.

murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

STATEMENT OF CASE

The petitioner was tried upon a bill of indictment charging him with the murder of George L. Lashley, the Chief of Police of Gibsonville, North Carolina. He was tried by a Judge and a jury in the Guilford County Superior Court at Greensboro, North Carolina, during the October 29, 1973 session of Court. The jury found the defendant guilty of murder in the first degree and the Superior Court entered its judgment condemning the defendant to death. The judgment of the lower court was affirmed by the Supreme Court of North Carolina on appeal.

STATEMENT OF FACTS

The respondent, State of North Carolina, agrees with those facts pertinent to this petitioner's rights to be adjudicated in the Supreme Court of the United States as set forth in that opinion of the North Carolina Supreme Court which is appended as Appendix "A" to the petitioner's Petition for Writ of Certiorari and heretofore filed in this Court.

ARGUMENT

I

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE *VOIR DIRE* EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF

SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTITUTIONAL METHODS OF JURY SELECTION AS MANDATED BY *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968).

Constitutional due process does not require the State to furnish a transcript of the *voir dire* examination of the jury when defendant has not requested such a transcript.

Petitioner Sparks claims that constitutional due process requires that the State furnish a transcript of the *voir dire* examination of prospective trial jurors in a capital case even in the absence of a request. This question is not properly before the Court, because, for all that appears in the record, the question is raised for the first time in the Petition for Certiorari. The question was neither raised in nor passed upon by the Supreme Court of North Carolina, nor does it appear in the record that a request was made to the trial court that a transcript be made and made available to the petitioner.

As this Court said in *Williams v. Georgia*, 349 U.S. 375, 382 (1954),

> "A state procedural rule which forbids the raising of a federal question at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of State power."

See also, *Chambers v. Mississippi*, 410 U.S. 284, at 308 et. seq. (1973) (opinion of Rehnquist, J.).

The rule of appellate practice in North Carolina is to the effect that the

> "Supreme Court will not decide questions which have not been presented or adjudicated in the court below, especially questions relating to the constitutionality of a statute or an act of Congress". 1 *Strong's, N. C. Index 2d*, p. 106 (1967), and cases there cited.

There is a second reason that this Court should not grant certiorari to question No. 1 raised by the petitioner, Sparks,

as to the requirement of a transcript of the *voir dire* examination of jurors. It is not the practice in North Carolina to make a transcript of the *voir dire* examination of jurors unless the transcript is requested by the defendant. But if such transcript is requested, it is granted as a matter of course. *State v. Fowler*, 285 N.C. 90, 103-107 (1974).

The Supreme Court of North Carolina in the *Fowler* case said, 285 N. C. at 107:

> "It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record in the case on appeal in a criminal case. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964); G.S. 15-180; G.S. 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or ommissions, it is the solicitor's responsibility to file exceptions or countercase. *State v. Fox, supra*. If, as in the present, defense counsel desires to take exception to the act of the Court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the *voir dire* examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved."

The principle underlying the right to counsel case, *Gideon v. Wainwright*, 372 U.S. 335 (1963), is that the criminal defendant should have at his disposal a trained advocate who knows the law and is able to adequately preserve his rights. All that has happened in this case is that Sparks' counsel failed to request that a transcript of the *voir dire* examination be made and failed to put a transcript of that *voir dire* examination into the record. In no sense of the word has the State of North Carolina *denied* this petitioner a transcript of the *voir dire* examination of jurors in his case in order that he might preserve his rights under *Witherspoon v. Illinois, supra*.

II

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

The State of North Carolina will substantially ratify the arguments presented by it in the Supreme Court of North Carolina and as contained in its brief filed in that Court. In its brief, the State advocated the position that the North Carolina rule substantially places the burden of proving the existence of malice upon the State and absolves the State of this burden only in extreme circumstances. Thus, the State could prove that a defendant: (1) used a deadly weapon; (2) pointed at the deceased; (3) fired the fatal shot, and still it would be charged with the burden of proving that such acts were accomplished intentionally. In effect, therefore, it would not be until the state also proved that the defendant intentionally used a deadly weapon that the burden of proof of a lack of malice toward the deceased would arise and shift to the defendant. The burden of such proof remains with the State and shifts only after additional proof of an intentional killing is established. It must be advocated that the shifting of the burden of proof to the defendant to disprove that he maliciously killed his victim, when these extreme circumstances are all proven, would be desirable. Especially would this be so when it is considered that evidence in mitigation would be more readily available to the defendant. See *State v. Drake*, 8 N.C. App. 214, 174 S.E. 2d 132 (1970); *State v. Currie*, 7 N.C. App. 439, 173 S.E. 2d 49 (1970); *State v. Sanders*,

276 N.C. 598, 174 S.E. 2d 487 (1970).

It is therefore, strongly argued by the State of North Carolina that its rule with regard to the burden of proof in a homicide case does not run counter to the holdings of *Re Winship*, 397 U.S. 358 (1970) and *Speiser v. Randall*, 357 U.S. 513 (1958). Rather, such rule is consonant with these holdings considering the fact that the initial burden of proof in such cases remains with the State.

III

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *The mere existence of prosecutorial discretion, plea bargaining, the absolute requirement for the imposition of the death penalty upon capital offense convictions, and executive clemency do not bring a mandatory death penalty statute within the prohibitions of the Furman decision.*

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346, the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is permitted, as a matter of discretion to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. The North Carolina Supreme Court case of *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, 23 (1973) was decided by that Court with knowledge of this Court's holding in *Furman* and decreed that the portion

of N.C.G.S. 14-17 which allows the jury the discretion (upon their guilty verdict of first degree murder) to recommend life imprisonment, invalidated only the discretionary portion of the statute and that (prospectively from the January 18, 1973 date of the *Waddell* decision) the North Carolina law would require that the court must pronounce a sentence of death upon every guilty verdict for any of the four capital offenses in North Carolina. The *Waddell* case was tried in the Superior Court of North Carolina prior to the *Furman* decision, and Waddell was sentenced to death. It was the first case to reach the North Carolina Supreme Court subsequent to *Furman*. The North Carolina Supreme Court then applied this court's *Furman* decision to Waddell and ordered his death sentence vacated and that he be sentenced to life imprisonment, 282 N.C. at 447 (North Carolina Supreme Court Reports).

The North Carolina Supreme Court further declared unconstitutional the following provisions of North Carolina General Statutes 14-17 (murder); 14-21 (rape); 14-52 (burglary); and 14-58 (arson):

> "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

For the reasons set forth in its opinion, our court demonstrated that the proviso clause was clearly severable from the clause setting forth the punishment as established by the North Carolina General Assembly. See *Waddell*, 282 N.C. at pages 441-445.

The *Waddell* decision thus left death as the only permissible punishment in North Carolina for the crimes of first degree murder, rape, burglary and arson. The North Carolina Constitution of 1970 specifically provided for such punishment.

Our court in *Waddell* went even further to protect the constitutional rights of its citizens against *ex post facto* laws, for at 282 N.C. at page 446, of that opinion it *held*:

> "North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed *prior to the date of this decision but shall be applied to any offense committed after such date*. (Emphasis added)."

The North Carolina General Assembly has consistently decreed the death penalty for first degree murder and rape for nearly two hundred years and has recently reaffirmed that policy.

In 1778, the State of North Carolina enacted what is now codified as G.S. 4-1 which states:

> "All such parts of the common law as were heretofore in force and use within this State, or so much of the Common Law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

As both murder and rape were capital felonies under the common law, they became so in North Carolina in 1778. Thus death has been the punishment for murder in the first degree and rape in North Carolina for nearly two hundred years. *Waddell, supra*, at 441.

It was in 1949 that our present statutes providing for punishment in capital cases were amended. Prior to that time the punishment was death.

The amendments to each of our capital punishment statutes added the proviso which (1) empowered the *jury in its discretion* to recommend and thus to fix the punishment at life imprisonment, and (2) required the trial judge to so instruct the jury. *Waddell, supra*, at 441.

The question which the North Carolina Supreme Court was confronted with was:

> "Does the remainder of G.S. 14-21 stand alone with death as the mandatory punishment for rape; or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?"

It was the sole duty and responsibility of our Supreme Court to answer that question. Justice Lake, speaking in a concurring opinion in *Waddell*, summed up that duty as concisely as can be done at 282 N.C. 448 and 449. He said:

> "The Supreme Court of the United States being the higher authority on the validity of judgments under the Consitution of the United States, its mandates, issued in reliance upon *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.
>
> The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in *Furman v. Georgia, supra*, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.
>
> Only this Court can determine whether any portion of G.S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature, now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G.S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute - an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. 1, §6; Art. IV, §1.

> It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape, hereinafter committed. Constitution of North Carolina, Art. I §6; Art. II, §1; Art. XI, §2. But the Legislature has spoken in G.S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G.S. 14-21 after the decision in *Furman v. Georgia, supra*. No officer or agency, save this Court, can make that determination.
>
> ...Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.
>
> Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in *Furman v. Georgia, supra*, is that the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty

of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court – today – not the date of the decision in *Furman v. Georgia, supra*, which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the *ex post facto* principle."

The Supreme Court of North Carolina answered the question it was confronted with in *Waddell* as follows:

"The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion. (282 N.C. at 442-443).

* * * *

In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder of the statute with death as the mandatory punishment for rape remains in full force and effect. (282 N.C. at 444-445).

* * * *

We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in *Furman*,

the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. (282 N.C. at 445).

In the application of its decision in *Waddell*, the North Carolina Supreme Court directed that the death penalty could not be imposed on any criminal whether tried or not for any capital offense committed at or before the time of the finding of its decision on January 18, 1973. (282 N.C. at 446). Compare *Johnson v. New Jersey*, 384 U.S. 719 (1966).

In *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), we have the first case to reach the Supreme Court of North Carolina for a crime committed subsequent to the *Waddell* decision. In the *Jarrette* case, the North Carolina Supreme Court was requested to reconsider its decision in *Waddell*. The court did and reaffirmed its decision, *id.* at page 654.

The Court noted in *Jarrette* at pages 654-655:

"The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. *Adderly v. Florida*, 385 U.S. 39 . . . reh.den., 385 U.S. 1020; *Shuttlesworth v. Birmingham*, 382 U.S. 87. . . .

* * * *

The contention of (Jarrette) is that a state statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

* * * *

This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court."

The major questions that the defendant recites in his petition regarding the prohibitions against the existence of prosecutorial discretion, plea bargaining, jury discretion, arbitrariness of a mandatory death penalty, and executive clemency are, also, very clearly answered in the *Jarrette* case.

As our court noted in the *Jarrette* case, 284 N.C. at 656:

> "Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of them briefly."

The court then addressed itself to each of the contentions of Jarrette and its answers are set forth at 284 N.C. 656-666.

These are found in Petitioner Jarrette's petition (No. 73-6877), Appendix "A", 202 S.E. 2d 721 at pages 741-747 which has heretofore been filed in this court.

The respondent, State of North Carolina, is unable, after research, to improve upon the reasoning and line of authorities set forth in the *Jarrette* opinion as noted immediately above. Accordingly, respondent adopts that reasoning and line of authorities as its response in this Court to the petitioners' contentions.

Respondent stipulates that the Governor of North Carolina does have the power to grant pardons and clemency to prisoners in the State's prison, and affirmatively shows that this Court has held this to be an unreviewable power in the hands of the chief executive. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

Respondent stipulates that its District Attorneys have the duty to exercise their respective judgments as to what crime the State's evidence warrants prosecuting, but shows unto the Court this judgment is a prerequisite to the carrying out of his constitutional duty, but the District Attorney's judgment must be exercised in accordance with law.

Respondent stipulates that its juries must exercise their respective judgments as to what crime, if any, the State's evidence has convinced them beyond a reasonable doubt an accused has committed. The respondent shows unto the Court that this exercise of judgment is a prerequisite to the performance of its constitutional duty and must be done in accordance with law.

B. *The mandatory death penalty is neither arbitrary nor inconsistent with contemporary standards of decency.*

The proscription against cruel and unusual punishment is applicable to the States through the due process clause of the Fourteenth Amendment. *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962). The North Carolina Supreme Court so held in *State v. Waddell*, 282 N.C. 431 at page 436, 194 S.E. 2d 19, 23 (1973).

Since the beginning of the United States as a separate nation two hundred years ago, death sentences have been administered by both the Federal and State governments for a variety of crimes. As the North Carolina Supreme Court noted in *Waddell, id.* at page 435:

> "Prior to the decision in *Furman v. Georgia* the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879); *In re Kemmler*, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States*, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); *Trop v. Dulles*, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *McGautha v. California*, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to *Furman* casts the slightest doubt on the constitutionality of capital punishment."

Nor is there reason to believe this Court now considers capital punishment to be cruel and unusual punishment, *per se*, within the meaning of the eighth amendment. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Justices of this Court went to some length to explain that they did not reach that question.

As the North Carolina Supreme Court noted in the *Waddell* case:

> "Mr. Justice Douglas . . . wrote . . . Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach . . . (282 N.C. at 437).
>
> Mr. Justice Stewart . . . expressed his views as follows . . . The constitutionality of capital punishment in the abstract is not . . . before us in (Furman) . . . (282 N.C. at p. 437-438).
>
> Mr. Justice White . . . depicts his views. (thusly) . . . 'I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment . . . '(282 N.C. at 438).
>
> Four members of the (U.S. Supreme) court dissented (in Furman). The position of the four dissenters is best summed up by Chief Justice Burger as follows: . . . . Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that punishment is barred for any particular class or classes of crimes . . . (282 N.C. at 439)."

Thus, our court having to apply this Court's *Furman* decision in *Waddell*, at 282 N.C. 439, held:

> "The foregoing quotations from the various separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion."

There can be no dispute that the federal government has no powers beyond those delegated to it in the Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the tenth amendment to the Constitution.

It is the State's contention that two of the incidents of those sovereign powers reserved to the States is the power to define criminal conduct and provide for the punishment therefor within the State's territory, limited only by the prohibition against cruel and unusual punishment contained in the eighth amendment.

Roscoe Pound in Volume II, *Jurisprudence*, part 12, *Law and the State* at page 317 states:

> "As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or the ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. According to Sir Frederick Pollock it is the capacity 'of making, declaring and amending the law . . . without reference to any other authority and without any legal limit to its own power.'

* * * *

But the idea of sovereignty begins with Bodin. He defined the state (*republica*) as an association governed by the highest power (*suprema majestas*) as the 'highest power over citizens and subjects, free from laws' (*legibus soluta*). Its chief characteristic was the power to give law to all citizens.

* * * *

At common law, social interests were largely secured by a doctrine that the king was *parens patriae*, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where 'public rights' (i.e. social interests or public interests) might be jeopardized.

Criminal law is the primary resource of the legal order for securing social interests immediately as

> such. At common law, prosecutions were in the name of the king and under the control of the Attorney General to the extent of his authority to enter *nolle prosequi* . . . (Pound. III *Jurisprudence*, Part 14, Scope, *Subject Matter of Law*, at p. 264."

Pound further discusses *Interests* in Part 14 of Volume III, *Jurisprudence* at page 238, *et. seq.* He specifically discusses the interests of the state as a legal entity.

> 1. *Interests of the state as a juristic person.*
>
> No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self-preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. (and) (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. Juristically, it is secured as a liberty...."

As the tenth amendment is directed toward maintaining the class of interests referred to by Pound as "public interests", *id.* (Vol. III at page 235), the United States of America is equally obligated to protect the State of North Carolina's exercise of its sovereign rights as it is to protect any other constitutionally protected right whether it be individual or State.

This Court, even if it desired to do so, would not abrogate a constitutionally guaranteed right of a State nor would it abrogate such rights of an individual. Thus

"contemporary standards" of "society" cannot be a proper basis for abolishing the death penalty under the Eighth Amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislature should the punishment for murder or rape be lessened in North Carolina.

No other body of men and women on the face of this earth should be lawfully entitled to exercise that governmental power other than the people of North Carolina, either directly in revolution or by vote on a new constitution.

In summarizing its argument, the State of North Carolina would aver that the petitioner is effectively requesting that this court construe the Eighth Amendment in such a manner as to nullify express provisions of the Fifth and Fourteenth Amendments, and deny to the states the power to prescribe and impose appropriate punishment for capital crimes. The petitioner is therefore requesting that this court nullify in reality, the power of the people as a republic, acting through their elected representatives, to establish appropriate punishments for crime. The respondent contends that to do this, the Court would be placing an unwarranted restriction on Article IV of the Tenth Amendment to the Constitution of the United States as well as nullifying express provisions of the Fifth and Fourteenth Amendments.

The lawmakers and law enforcers have an affirmative constitutional duty to ensure domestic tranquility. This is the office of the criminal justice system. (See Pound, III, *Jurisprudence*; Chapter 4, *Interest*, Section 92 at p. 264, (1959)). The limitations placed upon them by both the Federal and North Carolina Constitutions, are that "cruel and unusual" punishment shall not be afflicted. (See U.S. Constitution, Amendment VIII.) Neither life nor liberty shall be taken except by due process of law; nor shall any person be denied equal protection of the law. (See U.S. Constitution, Amendments V, VIII, XIV, and Article I, Sections 19, 22 and 27, North Carolina Constitution.) Operating within these limitations, it is State Legislatures' inherent and exclusive duty and it has the

correlative right to define crime and provide for the punishment of crimes committed. (See *Ex Parte U.S.*, 242 U.S. 27 (1916); *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963) app. dismd., 375 U.S. 9 (1963); *Lawton v. Steele*, 119 N.Y. 226, 23 N.E. 878 (1890), aff'd. 152 U.S. 133 (1894).

> And it has also been observed that:
>
> "The power is exclusive and it is not shared by the Court. So long as the Constitutional prohibitions are not infringed, the will of the legislature in this respect is absolute."

(See 21 Am. Jur. 2nd *Criminal Law*, Section 14, p.95, citing among others, *Central Lumber Company v. South Dakota*, 226 U.S. 157 (1912), *Coffey v. Harlan County*, 204 U.S. 659 (1907)). It is the duty of the executive to bring to justice those who commit crimes and it is the duty of the judiciary to assure that the accused receives due process and equal protection of the law. Just as the Constitution of the United States contemplates capital punishment, so does the Constitution of North Carolina expressly provide therefor. (See U.S. Constitution, Amendment V.; N.C. Constitution, Article 11, Section 2.)

CONCLUSION

The State of North Carolina, respondent, respectfully requests of this Court that it deny the petitioner's Petition for Writ of Certiorari to the Supreme Court of North Carolina.

This the 11th day of February, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an Assistant Attorney General licensed to practice law in the State of North Carolina and the United States Supreme Court.

That on February 11, 1975, he served a copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the person hereinafter named, at the place and address stated below by depositing said envelope and its content in the United States mail at Raleigh, North Carolina:

Address: Norman B. Smith
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